HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII 32 (2) (b)

Description of the case.

WPMS No. 161/05 (MS)
Kalika Prasad

Vs.

D.J. Rudraprayag and others

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 10.08.2006

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO.161 OF 2005 (MS)

Kalika Prasad s/o Sri Harikrishna
Village Jaula, Tehsil Ukhmath,
District Rudraprayag

.....Petitioner

Versus

1. District Judge, Rudraprayag
2. Kedar Singh s/o Sri Gabbar Singh, Village Pattyaun, Tehsil Ukhimath, District Rudraprayag
3. Dhan Singh s/o Sri Rudri Singh R/o village Jaula, Tehsil Agastmuni, District Rudraprayag
4. Presiding Officer, Poling Booth Juala, Bareith, Polling Centre No.24, District Rudraprayag
5. Returning Officer, Room No. 2 Table No.1, Block Agastmuni, District Rudraprayag.
6. District Panchayat Raj Officer, District Rudraprayag

.....Respondents

Sri Sharad Sharma, Advocate for the petitioner.

Sri R.P. Nautiyal and Standing Counsel for the respondents.

Dated: August 10, 2006

Hon'ble Rajesh Tandon, J.

Heard Sri Sharad Sharma, counsel for the petitioner and Sri R.P. Nautiyal and Standing Counsel for the respondents.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 19.02.2005 passed by the District Judge Rudraprayag.

Briefly stated, respondent no.2 filed election petition against the petitioner kalka Prasad and one Sri Dhan Singh respondent no.3, praying for setting aside the election of the

petitioner as well as counting for 70 votes which have not been counted.

According to the case of the respondent no. 2 on 20.02.2003 Sate of Uttaranchal issued a notification for holding Panchayat election in three phases. According to the schedule election of Gaon Sabha Jaula was to be held on 23.3.2003 and symbols were allotted to the candidates contesting the election.

The total numbers of votes were 464, whereas the total votes casted were 375. The poling had taken place on 24th March 2003 and counting was held on 30.3.2003 in Government Inter College, Agastmuni. Out of the total 375 votes the petitioner got 130 votes, respondent no. 2 got 127 votes and the respondent no.3 got 36 votes. 12 votes were declared invalid and 70 votes were not counted because they were not bearing the endorsement of the Presiding Officer.

The respondent no.2, therefore, in the election petition has alleged that the returning officer has not counted 70 votes inspite of the request made by the respondent no.2, which has martially affected the request to the respondent no.2. He has also alleged to have filed objection before the Returning officer.

The petitioner has filed written statement and he has not denied that any written objection was filed before the Returning Officer with regard to non counting of 70 votes. However, this fact has not been denied that 70 votes have not been counted as the Presiding Officer has not signed the same, in view of the circular letter issued by the Election Commissioner dated 6.3.2003. During the proceedings of the election petition, the petitioner has also filed notification issued by the Joint Secretary that the ballet paper which does not contain the

signatures of the Presiding Officer shall be treated to be invalid. Relevant extract of the circular letter is quoted below:

1. सील एवं/अथवा बार्ड क्रमांक न होने की स्थिति में जारी किए गए एवं पीठससीन अधिकारी द्वारा तैयार किए गए मतपत्र लेखा में मतपत्र अनुक्रमांक के आधार पर गणना के दौरान मतपत्र छटाई किए जाने के स्तर पर ही ऐसे मतपत्रों को गणना में शामिल किया जायेगा किन्तु जिस मतपत्र के पृष्ठ भाग पर पीठासीन अधिकारी के हस्ताक्षर नही है वह अवैध माना जायेगा और रद्द कर दिया जायेगा ।

Counter affidavit has been filed by the respondent no.2 who has stated that the agent of respondent no.2 has raised the objection before the Returning Officer but no attention was paid and in an arbitrary manner 70 votes were not counted.

S.D.M. has dismissed the Election Petition on 8.12.2004. Aggrieved by the said order, respondent no.2 went in revision. The revisional Court has allowed the revision with the following directions:

"The revision is allowed. The impugned judgment and order of the Prescribed Authority (S.D.M.) Ukhimath dated 8.12.2004 is quashed. The petition of Sri Kedar Singh is allowed in its entirely. Thus, the Sub Divisional Magistrate or the Prescribed Authority Ukhimath is directed to arrange for the counting of those 65/70 questioned ballot papers which are unsigned by the Presiding Officer and then declare the result of the election. He will make the compliance of these directions within fortnight. Meanwhile, Sri Kalika Prasad who is working as Pradhan of village Jaula presently is debarred to take any major decision financially or otherwise in the Gram Panchayat. If after counting these questioned ballot papers, Shri Kalika Prasad remains winner; then only he will act as Pradhan of the Gam Panchayat Jaula and not otherwise."

As will appear from the aforesaid order the District Judge, Rudraprayag has directed for recounting and if after counting of 70 ballot papers, the petitioner remains winner then only he will act as Pradhan of Gaon Sabha Jaula and not otherwise. Feelings aggrieved the present writ petition has been filed by the petitioner.

On 28.07.2005, following order was passed:

"Upon hearing Shri Sharad Sharma learned counsel for the petitioner as well as the learned counsel for the respondents, it is provided that the District Jude, Rudraprayag shall recount the votes and shall give the chart of valid votes, invalid votes, votes casts in favour of the petitioner and respondents.

The chart shall be submitted to this Court within a period of one month from today.

Interim order dated 01.03.2005 is extended till the next date of listing"

In pursuance of the order passed by this Court counting has taken place and the chart has been submitted by the District Judge, which shows as under:

1.	Sri Kedar Singh	168
2.	Sri Kalika Prasad	149
3.	Sri Dhan Singh	37

As such the respondent no. 2 secured highest votes than the petitioner. According to the order passed by the District Judge in case petitioner obtains higher votes, he will continue as Pradhad of Gaon Sabha, Jaula, otherwise not.

Counsel for the petitioner has submitted that it was not open for the Returning Officer to set aside the election of the petitioner under section 12-C of U.P. Panchayat Raj Act, as the

same is not covered under clause (a) and (b) of Section 12-C of the Act. 70 votes could not have been counted due to the absence of the initial of the Presiding Officer. Further submission of the counsel for the petitioner is that recounting could not have been permitted to make a roving inquiry.

So far as the applicability of sub clause (a) and (b) of Section 12-C of the Act is concerned jurisdiction to entertain the petition shall not be called in question except on the following ground that-

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election or,

(b) that the result of the election has been materially affected-

(i) by the improper acceptance or rejection of any nomination or:

(ii) by gross failure to comply with the provisions of this Act or the famed hereunder.

From a perusal of election petition filed by the respondent no.2 it appears that in paragraph 8 and 9 he has specifically pleaded that 70 votes have been illegally left out from its counting and as such election of the respondent no.2 has materially effected on account of improper rejection of the nomination. The relevant paragraphs to that effect are quoted below:

8. कि पीठासीन अधिकारी के हस्ताक्षर रहित ह्रास्त मतपत्रों की गिनती न होने के सम्बन्ध में प्रर्थी ने गणना के समय ही अपनी आपत्ति रिटनिर्गग आफिसर के समक्ष की थी कि मतगणना रोक दी जाय तथा निवार्चन की घोषणा रोक दी जाय तथा मतपत्रों का क्रमांक का मिलान पोलिंग पार्टी के पास उपलब्ध मतपत्रों की रसीद के क्रमांक से करवा दी जाय।

९. कि जब प्रार्थी द्वारा आपत्ति दाखिल करने के बावजूद भी रिटर्निंग आफिसर द्वारा मतगणना नही रोकी गयी तथा मतगणना का परिणाम विपक्षी संख्या ऊ के कक्ष में घोषित किया गया।

Rule 50 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules 1994, Provides for rejection of ballot papers on the following grounds:

50. Grounds for rejection of ballot papers-*(1) The Nirvachan Adhikari shall reject a ballot paper-*

(a) If it bears any mark or writing by which an elector can be identified or

(b) If it is a spurious ballot paper; or

(c) If it has been so damaged or mutilated tht its identity as genuine ballot paper cannot be established; or

(d) If a bears a serial number or a design different from the serial number or design, as the case may be, of the ballot papers authorised for use at the particular polling place; or

(e) If votes are given on it in favour of more candidates than the number of seats required to be filled in a constituency; or

(f) If no vote is recorded thereon.

(2) A vote recorded on a ballot paper shall be rejected if the mark indicating the vote is place on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given:

Provided that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once against the name of a particular candidates clearly appears from the way the paper is marked.

(3) The decision of the Nirvachan Adhikari as to the validity of a ballot papers or of a vote given on any such ballot paper shall be final subject, however, to any decision to the contrary given on the trial of an election petition calling in question the election.

Respondent no.2 has submitted that there is nothing in Rules 50 of the Act, so as to discard 70 ballot papers on account of any mistake committed by the Presiding Officer in not initialing the same.

However, counsel for the petitioner has submitted that in view of circular issued by the Joint Secretary, Election, the vote cannot be taken into consideration and 70 votes have rightly been discarded.

The extract of the circular letter reads as under:

उपयुक्त विषय के क्रम में अवगत कराना है कि त्रिस्तरीय पंचायत सामान्य विर्वाचन [illegible] निष्पक्ष स्वतंत्र तथा शान्तिपूर्वक कराये जाने हेतु यह आवश्यक है कि मतगणना संबन्धी कार्यवाही सावधानीपूर्वक सुनिश्चित की जाय। इस संबन्ध में राज्य निर्वाचन आयोग की ओर से मुझे यह कहने का निर्देश हुआ है कि कृपया मतगणना के दौरान निदेशों के अनुसार कार्यवाही सुनिश्चित की जायः

ऊ सील एवं/अथवा बार्ड क्रमांक न होने की स्थिती में जारी किए गए एवं पीठासीन अधिकारी द्वारा तैयार किए गए मतपत्र लेखा में मतपत्र अनुक्रमांक के अधार पर गणना के दौरान मतपत्र छटाई किए जाने के स्तर पर ही ऐसे मतपत्रों को गणना में शामिल किया जायेगा। किन्तु जिस मतपत्र कें पृष्ठ भाग पर पीठासीन अधिकारी के हस्ताक्षर नही है वह अवैध माना जायेगा और रद्द कर दिया जायेगा ।

It may be pointed out that U.P. Panchayat Raj Act, and the rules framed for election of Pradhan and Up-Pradhan are self-contained code and it provides rejection of the ballot papers only on certain grounds and as such any circular issued by the

Joint Secretary becomes only as directory and cannot be treated as mandatory as the same is out-side the preview of the rules framed under the Act. A perusal of the circular also does not show as to under what provision the same has been issued.

Counsel for the petitioner has referred the case Vadivelu vs. Sundaram and others, 2000 (8) SCC 355, wherein it has been held by the Apex Court that recounting cannot be order on the basis of general and bald allegations. The observations are quoted below:

In Ram Sewak Yadav v. Hussain Kamil Kidwai5 this Court held that an order for inspection of ballot can be granted under the following circumstances:

"An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) The Tribunal is prima facia satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To

establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice enquire, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

As will appear from paragraph 8 and 9 of the Election Petition that the respondent no.2 has specifically pleaded that 70 votes have illegally not counted as a result of the same the election result of the respondent no.2 was materially affected and as such the aforesaid two conditions are fully satisfied in the counting of 70 votes resulting in recounting of all the ballot papers.

The counsel for the petitioner has also referred the case of M. Chinnasamy vs. K.C. Palaniswamy2004 (6) SCC 341, where it has been held that recounting should not be made as of right. In the same judgment is has been held by the Apex Court to the following effects:

"In Jibontara Ghatowar v. Sarbananda Sonwal[18] wherein a case was made out that 824 ballot papers were rejected contrary to the provisions contained in Rule 63 of the Conduct of Elections Rules and in violation of the law laid down by this Court in Arun Kumar Bose v. Mohd. Furkan Ansari[19] this Court held that the High Court was in error in refusing to direct the re-counting of votes. While making the said observations, the Court relied upon an earlier decision of this Court in T.A. Ahammed Kabber v. A.A. Azeez[20] where one of

the members, Lahoti, J. was also a party noticing: (SCC p. 663-64, paras 27-28)

> *27. Though the inspection of ballot papers is to be allowed sparingly and the court may refuse the prayer of the defeated candidate for inspection if, in the grab of seeking inspection, he was indulging in a roving enquiry in order to fish out material to set aside the election, or the allegations made in support of such prayer were vague or too generalized to deserve any cognizance, nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice.*
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> * * *
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> *28. it is true that a re-count is not to be ordered merely for the asking or merely because the court is inclined to hold a re-count. In order to protect the secrecy of ballots the court would permit a re-count only upon a clear case in that regard having been made out. To permit or not to permit a re-count is a question involving jurisdiction of the court. Once a re-count has been allowed the court cannot shut its eyes on the result of re-count on the ground that the result of re-count as found is at variance with the pleadings. One the court has permitted re-count within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the re-count which has to be given effect to."*

Recounting having been permitted by the District Judge any by this Court, therefore, the eyes cannot be closed with

regard to the result of the respondent no.2, which shows that he has received highest vote i.e. 168.

Counsel for the respondent no. 2 has referred the case Jibontara Ghatowr v. Sarbananda Sonowal & others, JT 2003 (5) SC 353, where the Apex Court has held that obligation is cast on the Polling Officer to stamp with such distinguishing mark as the Election Commission may direct and to sing in full on the back of the ballot papers. The candidate has no role to play in the performance of such duty by the polling officer. If the Returning Officer feels satisfied that such defect has been caused by any mistake or failure on the part of the presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect. The Apex Court has held as under:

A bare reading of the rules shows that the obligation is cast on the polling officer to stamp with such distinguishing mark as the Election Commission may direct and to sig in full on the back of the ballot papers. The candidate has no role to play in the performance of such duty by the polling officer. Absence of mark and the signature renders the ballot paper liable to be rejected. However, still, where the Returning Officer feels satisfied that such defect has been caused by any mistake or failure on the pat of the Presiding Officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect. An analysis of this rule and the legal implication thereof may not detain us any longer inasmuch as we find there rules having been dealt with in Arun Kumar Bose v. Mohd. Furkan Ansari[1], wherein this Court found that the absence of signature and distinguishing mark on seventy-four ballot papers was attributable to failure on the part of the

Presiding Officer. Having found so, the Court held: (SCC p. 101, para 14)

"It was the obligation of the Presiding Officer to put his signature on the ballot papers before they were issued to the votes. Every vote has the right to vote and in the democratic set-up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view, we are of the definite view that the present case is one of failure on the part of the Presiding Officer to put his signature on those ballot paper so as to satisfy the requirement of law. The proviso, one it is applicable, has also a mandate that the ballot paper is not to be rejected. We, therefore, hold that the ballot papers were not liable to be rejected as the proviso applied and the High Court, in our opinion, came to the correct conclusion in counting these ballot papers and giving credit therefore to Respondents 1."

It is pertinent to note that it is nobody's case that 824 ballot papers were spurious. The present one is not a case of booth-capturing or rigging. In an election dispute, there are not the candidates alone who are the persons interested. In a democratic set-up, as is ours, in an election, the fate of the whole constituency is at stake and every voter and every citizen has, therefore, an interest in that candidate being returned to assembly who has secured the majority of the valid votes. An election dispute cannot be decided on concessions contrary to law. A defect in the ballot papers in the light of Rule 38(1) read with Rule 56 (2)(h) having been detected, the issue had to be decided by the satisfaction of the Returning Officer. The concession given by candidates or their election

agents submitting to a decision arrived at by the Returning Officer in accordance with the law may come in the way of that candidate turning around and disputing a doubtful position of law taken as resolved and conceded or accepted. In an election dispute, a consensus contrary to law or a failure to discharge statutory obligation cast on an election officer which has resulted in prejudicing the result of the election, cannot ipso facto claim immunity from challenge. In the present case the Returning Officer has clearly failed in discharging his obligation cast by the first proviso below clauses (g) and (h) of sub-rule (2) of Rule 56. Disagreeing with the High Court, therefore, we hold that these 824 ballot papers should have been included for the purpose of counting.

Similar view has been taken in the case Hari Shankar Prasad vs. Shahid Ali Khan and others (JT 2003 (3) SC 229. The Apex Court has held as under:

"On consideration of all the material available on the record, we find that the wrong stamp was made available to the voters by the Polling Officer. That being the position, such of the ballot papers marked by the stamp supplied have been wrongly rejected by the Returning Officer and they are to be counted in favour of the appellant-petitioner also as per the directions of the Election Commission. The margin of votes between the two contenders is only thirty-five votes, counting ninety votes in favour of the appellant would provide a lead of fifty-five votes to the appellant-petitioner who would be entitled to being declared elected.

18. *For the discussion held above, the election petition is allowed with costs. The declaration of Respondent 1 as elected*

is set aside and the appellant-petitioner is declared elected from Sitamarhi Assembly Constituency No. 67, State of Bihar."

It may be pointed out that, it is not a case of recounting but it was a case of rejection of 70 ballot papers. Therefore, after 70 votes are counted, recounting has to take place with regard to different candidates. However, after counting of 70 votes result having been declared, I find no illegality so as to interfere under Article 226/227 of the Constitution of India.

The Apex Court has held that due to some inadvertent mistake on the part of Presiding Officer by not signing on the back of ballot papers, the ballot papers cannot be invalidated.

The revisional Court has also considered the entire record of the case and has come to the conclusion that by the mistake of the Polling Staff right of the franchise of the electorates cannot be reduced to nullify. If is a valuable right and it cannot be defeated by mistake or negligence.

Relying on the judgment Jagit Singh Vs. Gyani Kartar Singh, AIR 1996 SC 773, and Ram Sewak Yadav vs. Hussain kamil Kidwi, AIRI 1964 SC 1249, it has been held by Allahabad High Court in the case Shobh Nath vs. State of U.P. & others, 1999 R.D. 50 as under:

"The first case in the series, which is required to be referred is Jagit Singh vs. Gyani Kartar Singh. It was observed that in a proper case, the election Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. In exercising this power, the Tribunal has to bear in mind certain important considerations, such as that the petition should contain a

concise statement of the material facts on which the petitioner relies and in every case where a prayer is made by the petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by a the petitioner in that behalf contained a concise statement of the material facts on which he relied. In an earlier case of Ram sewak Yadav v. Hussain Kamil Kidwai, the Apex Court set out the circumstances when an order of inspection of ballot papers can be made in the following terms:-

An order for inspection my not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two conditions are fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case, and

(ii) the Tribunal is prima facie satisfied that an order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts."

In view of the above, no interference is required under Article 226/227 of the Constitution of India as 70 votes have materially affected the entire result of election. The respondent

no. 2 having secured votes more than the petitioner is hereby declared as a successful candidate. If respondent no.2 has not been given charge as per order passed by the District Judge, the same shall be handed over to him within a period of two weeks.

Accordingly, writ petition is dismissed.

No order as to costs.

Dated: 10.08.2006 **(Rajesh Tandon, J.)**

*Dhyani